VIRGINIA SECTION

NOTICE UNDER SECTION 6040 OF CODE 1919—PARTICULARITY OF ALLEGATION.—The recent decision in the case of *Mankin* v. *Aldridge*,[1] should be of interest to all of the profession in Virginia who have cast aside the ancient practice at Rules for the more expeditious method of Notice and Motion, as set forth in § 6040 of the Code of 1919, for the Supreme Court has therein indicated that the liberality of the change is more a matter of procedure than of form, and that the substantial requisites of both writ and declaration must be embodied in the notice given. The question presented was whether, in a notice to a debtor, an item charging "15,500 staves Long Branch, $6.00 per M. . . . . $93.00" was of sufficient particularity to indicate that the debt was for the *hauling* of those staves and not the purchase price of the goods themselves. It was held that it was not.

In disposing of the question, Burks, J., said,

> "If this were the only error committed on the trial, we would hardly reverse the judgment of the trial court, but we do not recede from the proposition that, no matter what form of procedure is adopted, every litigant has the right to be informed in plain and unmistakable language of the ground of complaint or defense of his adversary. The procedure by notice under section 6040 of the Code is looked upon with great indulgence, not because the notice is supposed to be the act of a layman ignorant of forms of procedure, for that would be contrary to almost universal experience, but because the courts are loath to sacrifice substance to form, and desire, so far as possible, to avoid that result. The adoption of this method of procedure, however, cannot dispense with the allegation of the substance of a good ground of action or defense. Anything less than this would endanger the substantial rights of litigants."

There are several older cases which construe the provisions of former Codes in regard to notice, and the text of the case at hand is in accord with the holdings in those earlier decisions. In *Security Loan and Trust Co.* v. *Fields*,[2] the question arose under § 3211 of the Code of 1887, referring to notice, and presented a case in which the notice given alleged a cause of action by the holder of a note against the indorser, but failed to show that the note was protested or that notice of the dishonor was given. It was held that such notice was insufficient. In construing the section, Caldwell, J., said,

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[1] (Va.) 105 S. E. 459.
[2] 110 Va. 827, 67 S. E. 342.

"While in proceedings on motion for judgment for money under the statute, *supra,* the notice takes the place of both the writ and the declaration, and is viewed with great indulgence by the courts, this does not relieve the plaintiff of the requirement that he set out in his notice to the defendant matter sufficient to maintain the action."

In *Colley* v. *Summers Parrott Co.*,[3] the same rules as to the substantial sufficiency of the notice were reiterated, and in this case an allegation of debt on a "promissory note" was held sufficient to import the idea of negotiability.

It is manifest from the trend of the decisions and the recent holding of the present Supreme Court that the interest of the defendant may not be jeopardized by any indefiniteness in the plaintiff's allegation, which the latter might seek to excuse under the plea of a liberal construction of § 6040.

I. G. C.

EVIDENCE—HEARSAY—SPONTANEOUS DECLARATIONS NOT NECESSARILY PART OF THE RES GESTAE.—In the recent Virginia case of *Washington-Virginia R. Co.* v. *Deahl*,[1] which was an action by a passenger on an electric car for injuries received when the car on which she was riding collided with a motor truck, the Supreme Court of Appeals admitted the testimony of other passengers that *immediately after* the collision, the motorman stated to the driver of the truck, that this was the third time the driver had tried to pass in front of the car, and that he had gotten him. Under the circumstances the decision was undoubtedly correct, but the court stated that the declaration was admissible as part of the *res gestæ,* and the advisability of the use of this term in the connection is at least doubtful.

As is well known great confusion exists among the authorities as to the proper employment of the term *res gestæ.* The rule is frequently laid down that a declaration to be admissible under this principle must have been *contemporaneous* with the occurrence[2]—made "by the actor while acting". But on the other hand we have numerous cases in which statements have been admitted when made by the actor, or an outsider, immediately *after* the act, but while his mind was still controlled by the excitement occasioned by the occurrence.[3]

This apparent contradiction seems to be due to the failure of some of the courts, including that of Virginia, to recognize, expressly at least, that in the latter class of cases we have to do with a distinct exception to the Hearsay Rule, under which what

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[3] 119 Va. 439, 89 S. E. 906. [1] 126 Va. 141, 100 S. E. 840.

[2] 1 GREENLEAF, EVIDENCE, 16th. ed., § 108, p. 188.

[3] Dismukes *v.* State, 83 Ala. 287, 3 So. 671; State *v.* Horan, 32 Minn. 394, 20 N. W. 905; Virginia cases, *infra,* note 9.